



December 12, 2000

Mr. B.J. "Beni" Hemmeline
Civil Chief
Lubbock County
904 Broadway, Second Floor
Lubbock, Texas 79401

OR2000-4680

Dear Mr. Hemmeline:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 142160.

Lubbock County (the "county") purportedly received a request for the personnel file of a specific county deputy. You state that the county has provided most of the requested information to the requestor. However, you claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.102, 552.114, 552.115, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of the information at issue.¹

We begin our analysis with a procedural issue. Section 552.301 of the Government Code dictates the procedure that a governmental body must follow if it wishes to ask the attorney general for a decision determining whether requested information falls within an exception to disclosure. Among other requirements, the governmental body, "no later than the 15th business day after the date of receiving the written request," must submit to the attorney general "a copy of the written request for information." Gov't Code § 552.301(e)(1)(B). If the governmental body fails to fulfill this requirement, the requested information "is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." Gov't Code § 552.302.

¹We assume that the "representative sample" of records submitted to this office is truly representative of all of the information at issue. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than those submitted to this office.

You state that the county received the request for information on September 27, 2000. Accordingly, the county's deadline for submitting a copy of the request for information to this office expired fifteen business days later on October 18, 2000. *See* Gov't Code § 552.301(e)(1)(B). However, as of the date of this ruling, this office has yet to receive a copy of the request for information. Therefore, the county has missed its fifteen-day deadline as prescribed by section 552.301. Consequently, absent a compelling reason to withhold the requested information, the information must be released.

This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Because you raise various arguments, claiming that portions of the requested information are confidential by other sources of law or affect third party interests, we will address your arguments.

You claim that much of the submitted information is confidential under section 552.102 of the Government Code. Section 552.102(a) protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" The scope of section 552.102(a) protection, however, is very narrow. *See* Open Records Decision No. 336 (1982). *See also* Attorney General Opinion JM-36 (1983). The test for section 552.102(a) protection is the same as that for information protected by common law privacy under section 552.101:² the information must contain highly intimate or embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

In Open Records Decision No. 373 (1983), we concluded that personal financial information can generally be considered highly intimate and embarrassing:

In our opinion, all financial information relating to an individual — including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history — ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities

However, information regarding a financial transaction between an individual and a governmental body is a matter of legitimate public interest not generally protected from

²Section 552.101 excepts from required public disclosure "information that is confidential by law, either constitutional, statutory, or by judicial decision."

public disclosure by common law privacy. Open Records Decision Nos. 590 at 3 (1991), 523 at 3-4 (1989). For example, the salary of a public employee is not excepted from disclosure. Open Records Decision No. 342 (1982). Further, the doctrine of common law privacy does not generally except from disclosure public employee participation in an insurance program that is funded wholly or partially by his or her employer. Open Records Decision No. 600 at 9 (1992). Of course, personal financial information does not meet the test for common law privacy unless it is also of no legitimate interest to the public. In Open Records Decision No. 373 (1983), we concluded that the determination of whether the public's interest in obtaining highly intimate and embarrassing information is sufficient to justify its disclosure must be made on a case-by-case basis.

You have highlighted financial and personal information contained within the submitted documents that you contend is confidential under common law privacy as encompassed by section 552.102. We agree that most of the highlighted financial and personal information falls under common law privacy and must therefore be withheld under section 552.102. However, in this instance, we believe that there is a legitimate public interest in information revealing whether or not a county deputy has a drug-use history. Moreover, we do not consider fingerprints to be intimate or embarrassing. Therefore, these two types of information may not be withheld under section 552.102, and must be released to the requestor.

Next, we address your argument regarding section 552.117 of the Government Code. Subsection 552.117(2) provides for the confidentiality of current and former peace officers' home addresses, home telephone numbers, social security numbers, and family member information. We agree that most of the information you have highlighted as being confidential under section 552.117(2) must be withheld under that provision. However, for some of the information that you have highlighted in this regard, you have not provided us with sufficient facts for us to determine whether the information falls within the scope of section 552.117(2). Therefore, we emphasize that the county may only withhold information that specifically falls within one of the four categories listed in section 552.117(2).

In regard to the birth certificate contained in the submitted documents, you argue that it is confidential under section 552.115. Birth or death records held by the bureau of vital statistics or local registration officials are excepted from required public disclosure under section 552.115 of the Government Code. However, since the birth certificate in this case is not held by the bureau of vital statistics or local registration officials, section 552.115 is inapplicable. However, some of the information contained in the birth certificate is confidential under section 552.117(2) described above. We have marked the birth certificate accordingly.

You also claim that the submitted documents contain confidential criminal history information. Section 552.101 of the Government Code excepts from required public disclosure "information that is confidential by law, either constitutional, statutory, or by

judicial decision." Accordingly, section 552.101 encompasses confidentiality provisions regarding criminal history information. Criminal history record information generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential by statute. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the department maintains, except that the department may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from the department or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Please note, however, that driving record information is not confidential under chapter 411. *See* Gov't Code § 411.082(2)(B). The submitted documents contain confidential CHRI the release of which is governed by chapter 411. Therefore, the county must withhold the CHRI under section 552.101.

You claim that the submitted documents also contain a medical record. As explained above, section 552.101 encompasses confidentiality provisions such as those found in the Medical Practice Act ("MPA"). The MPA provides in relevant part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision

No. 565 at 7 (1990).³ Thus, the MPA governs access to medical records. Open Records Decision No. 598 (1991). Moreover, information that is subject to the MPA includes both medical records and information obtained from those medical records. See Occ. Code § 159.002(a), (b), (c); Open Records Decision No. 598 (1991). We agree that the medical record you have highlighted falls under the MPA. Therefore, the county may release this medical record only in accordance with the MPA.⁴

Your last claim is that the submitted information contains educational records which are confidential under section 552.114. The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. See 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 and FERPA. Open Records Decision No. 539 (1990). Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. You argue that two college transcripts contained in the submitted information are confidential under FERPA and section 552.114. However, because the county is not an educational institution, neither FERPA nor section 552.114 applies to college transcripts or other educational types of records maintained by the county. Therefore, the county may not withhold the college transcripts.

Next, we address certain types of information for which the county did not raise specific arguments, but which are confidential nonetheless. For example, the submitted documents contain an Employment Eligibility Verification, Form I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); see 8 C.F.R. § 274a.2(b)(4). Release of this document under the Public Information Act would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that Form I-9 is confidential under section 552.101 of the Public Information Act and may only be released in compliance with the federal laws and regulations governing the employment verification system.

³Inasmuch as the Seventy-sixth Legislature intended no substantive change in the law in codifying the Medical Practice Act at subtitle B of title 3 of the Occupations Code, open records decisions interpreting the former section 5.08 of article 4495b of Vernon's Texas Civil Statutes retain their relevance. See Act of May 13, 1999, 76th Leg., R.S., ch. 388, § 7, 1999 Tex. Gen. Laws 1431, 2440.

⁴See Occ. Code §§ 159.004(5), 159.005(1) (providing that otherwise confidential medical information may be released to a person who bears a written consent of the patient, subject to certain requirements).

Also contained in the submitted documents, is a federal tax form. Prior decisions of this office have held that title 26, section 6103(a) of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Generally, any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code is confidential. *Mallas v. Kolak*, 721 F. Supp. 748 (M.D.N.C. 1989); *Dowd v. Calabrese*, 101 F.R.D. 427 (D.C. 1984). Thus, the county must withhold the tax form from disclosure under section 552.101 as information deemed confidential by federal statute.

Next, several documents contain motor vehicle information that is confidential under section 552.130. Section 552.130 of the Government Code prohibits the release of information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. Therefore, under section 552.130, the county must withhold the Texas driver's license numbers and copies of Texas driver's licenses in their entirety.

Finally, section 552.119 of the Government Code prohibits the release of a photograph that depicts a peace officer as defined by article 2.12 of the Code of Criminal Procedure except in certain circumstances. There are several photographs of the county deputy in the submitted personnel file. Unless the deputy has given his consent to release of the photographs or one of the exceptions set forth in section 552.119 applies, the county must withhold the photographs.

In conclusion, the county must withhold the marked personal and financial information under section 552.102 of the Government Code. The county must withhold the marked information falling under any of the four categories prescribed in section 552.117(2). The county must withhold the marked criminal history information under chapter 411 of the Government Code. The county must withhold the marked medical record under the Medical Practice Act. The county must withhold the employee verification form and the federal tax form under section 552.101. The county must withhold the marked motor vehicle information under section 552.130. Finally, the county must withhold photographs of the county deputy under section 552.119. The county must release the remaining information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

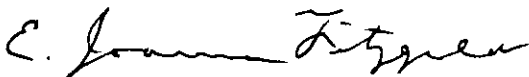
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

EJF\er

Ref: ID# 142160

Encl: Submitted documents

cc: Mr. Mel Tittle
c/o Mr. B.J. "Beni" Hemmeline
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(w/o enclosures)